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IN THE

Supreme Court of the United States

October Term, 1962.

No. 502

KENNETH C. RAINS,
Petitioner,

vs.

STATE OF NEBRASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Your Petitioner, Kenneth C. Rains, a citizen of the State of Missouri, respectfully prays to this honorable Court that a writ of certiorari be issued to the Supreme Court of Nebraska, to review a judgment of that Court entered on March 30, 1962, wherein the conviction of petitioner for second degree arson was affirmed; and an order of that Court entered on May 18, 1962, denying petitioner motion for a rehearing.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported in *Rains v. State*, 173 Neb. 586, 114 N. W. 2d 399. A copy of the opinion is attached to this petition and may be found in Appendage A, and on page 108 of the record. There is no opinion of the trial court regarding your petitioner's conviction. The order denying petitioner's rehearing is shown in a journal entry of the Nebraska Supreme Court and will be found in Appendage B and on page 134 of the record.

JURISDICTION

The judgment of the Supreme Court of Nebraska affirming the conviction of your petitioner was entered on March 30, 1962, and dated as of that date.

On May 18, 1962, the Supreme Court of Nebraska entered an order denying petitioner's request for a rehearing on his appeal of his conviction for second degree arson. On August 16, 1962, an order was entered in the Supreme Court of the United States extending the time for filing this petition for writ of certiorari to and including October 15, 1962; this order was signed by Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States.

The opinion of the Nebraska Supreme Court presents novel and serious constitutional questions under the "equal Protection" and "due process" clauses of the Fourteenth Amendment of the Constitution of the United States. The decision of the Nebraska Supreme Court is probably not in accord with the applicable decisions of the Supreme Court of the United States. The decision of the Supreme Court of Nebraska and the laws of the State of Nebraska denied your petitioner the following constitutional rights:

(1) Petitioner's right to adequately defend against criminal charges, (2) Petitioner's right to stand upon an equality before the bar of justice, (3) Petitioner was deprived of a fair trial in that certain testimony was made accessible to the prosecuting attorney while certain testimony was denied your petitioner under identical or similar circumstances, (4) the denial of due process of law by the arbitrary ruling of the trial court, not based on the facts of the case, on a material matter in the case.

The jurisdiction of the Supreme Court of the United States is invoked under 62 Stat. 929; 28 U. S. C. A. § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. In a criminal action is it a denial of due process of law, and a denial of the equal protection of the laws, for a trial judge to allow the State to produce at the trial a witness incarcerated in its penitentiary to testify against the defendant upon the mere allegation of the prosecuting attorney that the witness "* * * is to be a material witness * * *" in the case and deny the defendant the opportunity of taking the deposition of a prisoner incarcerated in the penitentiary of the State, where the defendant alleges that testimony of the witness is necessary "* * * in order to properly defend himself * * *?"

2. Is it a denial of due process of law to impose upon a defendant in a criminal case the condition of showing that the testimony of a prospective witness incarcerated in the penitentiary of the State is material to the defendant's defense in order that the Defendant may take the deposition of the incarcerated witness where said prospective witness is endorsed on the information by the prosecuting attorney, and later in the criminal action

allow the prosecuting attorney to amend the information by striking the name of the prospective witness from the information?

3. Does a State statute restricting a Defendant in a criminal action to the taking of a deposition of a witness incarcerated in the State's penitentiary deny the Defendant due process of law by restricting his right to defend?

4. Does the legal machinery of a state permitting a defendant in a criminal action to produce in person at the trial as a witness any person incarcerated in the county where the trial is taking place, while restricting other defendants in criminal actions to the taking of depositions of persons incarcerated in counties other than where the trial takes place, violate the equal protection of the laws of the Fourteenth Amendment to the Constitution of the United States as having no relation to the guilt or innocence of the accused nor to the availability of the prospective witnesses?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 29-1904, R. R. S. 1943:

"Where any issue of fact is joined on any indictment, and any material witness for the defendant resides out of the state, or, residing within the state, is sick or infirm or is about to leave the state, such defendant may apply in writing to the court in term time, or the judge thereof in vacation, for a commission to examine such witness upon interrogatories thereto annexed, and such court or judge may grant the same, and order what and for how long a time notice shall be given the prosecuting attorney before the witness shall be examined."

Section 29-1905, R. R. S. 1943:

"The proceedings in taking the examination of such witness and returning it to court shall be governed in all respects as the taking of depositions in all civil cases."

Section 25-1233, R. R. S. 1943:

"A person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases, his examination must be by deposition."

STATEMENT OF THE CASE

Your petitioner was charged by information of the County Attorney of Hall County, Nebraska (in Nebraska the County Attorney is the prosecuting attorney) with the crime of arson, second degree (See § 28-504.02, R. R. S. 1943). Petitioner entered a plea of not guilty and obtained a change of venue from Hall County to Howard County, Nebraska.

On December 30, 1960, the County Attorney filed an application for the production of one of the imprisoned witnesses who was endorsed on the information to wit: